

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Operations Committee

BILL: CS/CS/CS/SB 2762

INTRODUCER: Governmental Operations Committee, Judiciary Committee, Children, Families, and Elder Affairs Committee, and Senators Dockery and Lynn

SUBJECT: Access to Confidential Records of Children

DATE: April 22, 2008 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Jameson	CF	Fav/CS
2.	Daniell	Maclure	JU	Fav/CS
3.	Rhea	Wilson	GO	Fav/CS
4.	_____	_____	HA	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill requires that a case file for a child under the supervision of or in the custody of the Department of Children and Families (DCF or the department) be maintained in a complete and accurate manner and be made available for copying or review upon request at no cost to the child, the child’s caregiver, guardian ad litem, or attorney, or to an adoption entity under specified circumstances.

The bill authorizes courts to approve the release of confidential information if necessary to ensure access to appropriate services or for the safety of the child, and authorizes the sharing of confidential and exempt information between all state and local agencies and programs that provide services to or are responsible for the safety of children.

The bill authorizes access to confidential and exempt child abuse records by community-based care lead agencies and their subcontracted providers, as well as by persons with whom placement of a child is being actively considered or has been granted.

The bill authorizes the Secretary of the department to release confidential and exempt records pertaining to investigations of abuse, abandonment, neglect, or exploitation of a child or a vulnerable adult which resulted in serious mental, emotional, or physical injury, if the Secretary determines that release is in the public interest. The bill provides guidelines for the Secretary to follow in making a determination of public interest, and before records are made public, the Secretary must state in writing and with specificity the basis for the determination of public interest. If the Secretary determines that release of the records is in the public interest, the department must redact any identifying information.

The bill requires the department, at least three business days prior to releasing confidential and exempt records, to make a good faith effort to provide notice of the release to specified individuals. After receiving notice, any person notified may petition a circuit court for an order preventing the department from releasing the records, and the circuit court may order the department not to release the records only after finding that the best interests of the petitioner outweigh the public interest.

This bill substantially amends the following sections of the Florida Statutes: 39.202, 39.2021, 402.115, 415.107, and 415.1071. The bill creates section 39.00145, Florida Statutes.

II. Present Situation:

Florida Public Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, section 24 of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Public Records Act³ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency⁴ records are available for public inspection. Section 119.011(11), F.S., defines the term “public record” very broadly to include “all documents, ... tapes, photographs, films, sounds recordings, ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Unless made exempt, all such materials are open for public inspection at the moment they become records.⁵

Only the Legislature is authorized to create exemptions to open government requirements. Exemptions must be created by general law, and such law must specifically state the public

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² FLA. CONST. art. I, s. 24.

³ Chapter 119, F.S.

⁴ Section 119.011(2), F.S., defines *agency* as “any state, county, ... or municipal officer, department, ... or other separate unit of government created or established by law ... and any other public or private agency, person, ... acting on behalf of any public agency.”

⁵ *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

necessity justifying the exemption.⁶ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁷ A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁸

Section 119.10, F.S., prescribes the penalties for violations of ch. 119, F.S., as follows:

- Any public officer who:
 - Violates any provision of this chapter commits a noncriminal infraction, punishable by fine not exceeding \$500.
 - Knowingly violates the provisions of s. 119.07(1), F.S., relating to the inspection and copying of public records, is subject to suspension and removal or impeachment and, in addition, commits a misdemeanor of the first degree.
- Any person who willfully and knowingly violates:
 - Any of the provisions of ch. 119, F.S., commits a misdemeanor of the first degree.
 - Section 119.105, F.S., relating to police reports, commits a felony of the third degree.

Public records do not necessarily lose their exempt status once they are disclosed. In *Ragsdale v. State*, the Florida Supreme Court held:

[T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record ... the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands.⁹

In *City of Riviera Beach v. Barfield*, the court stated, “[T]he primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests. Had the legislature intended the exemption ... to evaporate upon the sharing of that information ... , it would have expressly provided so in the statute.”¹⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act¹¹ provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption

⁶ FLA. CONST. art. I, s. 24(c).

⁷ *Id.*

⁸ *Id.*

⁹ *Ragsdale v. State*, 720 So.2d 203, 205-06 (Fla. 1998).

¹⁰ *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994). In *Barfield*, Barfield argued that once the City of West Palm Beach shared its active criminal investigative information with the City of Riviera Beach the public record exemption for such information was waived. Barfield based that argument on a statement from the 1993 *Government-In-The-Sunshine Manual* (a booklet prepared by the Office of the Attorney General). The Attorney General opined “once a record is transferred from one public agency to another, the record loses its exempt status.” The court declined to accept the Attorney General’s view. As a result, that statement has been removed from the *Government-In-The-Sunshine Manual*.

¹¹ Section 119.15, F.S.

may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹² An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.¹³ An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which ... would be defamatory ... or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which ... would injure the affected entity in the marketplace.¹⁴

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹⁵

Department of Children and Family Services

The Department of Children and Family Services (DCF or the department) is an executive branch agency headed by a Secretary appointed by the Governor and confirmed by the Senate.¹⁶ The Secretary must ensure that the mission of the department is fulfilled in accordance with state and federal laws, rules, and regulations.¹⁷ As part of its responsibilities, the department investigates reports of abuse, abandonment, neglect, or exploitation of children and vulnerable adults.¹⁸ Sensitive information regarding children, vulnerable adults, and alleged perpetrators is collected during those investigations.

Public Record Exemptions for the Department

Current law provides public record exemptions for all records held by the department concerning reports of abuse, neglect, or abandonment of a child¹⁹ and reports of abuse, neglect, or exploitation of a vulnerable adult.²⁰ This includes reports made to the central abuse hotline and all records generated as a result of such reports.

¹² Section 119.15(6)(b), F.S.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Section 119.15(6)(a), F.S.

¹⁶ Section 20.19(2), F.S.

¹⁷ Section 20.19(2)(d), F.S.

¹⁸ *See* chapters 39 and 415, F.S.

¹⁹ Section 39.202(1), F.S.

²⁰ Section 415.107(1), F.S.

The exemptions authorize release of the confidential and exempt information²¹ to certain agencies and persons or under certain circumstances.²² For example, the department may release information to the Department of Health, the Agency for Persons with Disabilities, or county agencies responsible for carrying out child or adult protective investigations, ongoing child or adult protective services, early intervention and prevention services, Healthy Start services, licensure or approval of adoptive homes, foster homes, or child care facilities, or services for victims of domestic violence.²³

Current law also authorizes any person or organization, including the department, to petition the court for an order making public the records of the department pertaining to investigations of alleged abuse, neglect, or abandonment of a child²⁴ or alleged abuse, neglect, or exploitation of a vulnerable adult.²⁵ The court must determine whether good cause exists for public access. In making this determination, the court must balance the best interests of the:

- Child and that child's siblings, together with the privacy rights of other persons identified in the reports, against the public interest.²⁶
- Vulnerable adult, together with the privacy rights of other persons identified in the reports, against the public interest.²⁷

The law also authorizes the department to petition the court for an order for the immediate public release of department records pertaining to cases that involve serious bodily injury.²⁸ The court, within 24 hours after the department files the petition,²⁹ must determine whether good cause exists.³⁰ If the court determines that good cause exists for public access, the court must direct the department to redact³¹ the name and other identifying information of any person identified in any

²¹ There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and *confidential*. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute. If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information. *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53-54 (Fla. 5th DCA).

²² See s. 39.202(2), F.S., and s. 415.107(2) and (3), F.S.

²³ Section 39.202(2)(a), F.S.

²⁴ Section 39.2021(1), F.S.

²⁵ Section 415.1071(1), F.S.

²⁶ Section 39.2021(1), F.S.

²⁷ Section 415.1071(1), F.S.

²⁸ Sections 39.2021(2) and 415.1071(2), F.S. In cases involving a child, the petition must be personally served upon the child, the child's parent or guardian, and any person named as an alleged perpetrator in the report of abuse, abandonment, or neglect. In cases involving a vulnerable adult, the petition must be personally served upon the vulnerable adult, the vulnerable adult's legal guardian, if any, and any person named as an alleged perpetrator in the report of abuse, neglect, or exploitation.

²⁹ If the court does not grant or deny the petition within the 24-hour period, the department may release to the public summary information that includes a confirmation that an investigation has been conducted concerning the alleged victim; the dates and brief description of procedural activities undertaken during the department's investigation; and the date of each judicial proceeding, a summary of each participant's recommendations made at the judicial proceeding, and the ruling of the court. The information cannot include the name of, or other identifying information with respect to, any person identified in any investigation. Section 39.2021(2), F.S.

³⁰ Sections 39.2021(2) and 415.1071(2), F.S.

³¹ Section 119.011(12), F.S., defines "redact" to mean "to conceal from a copy of an original public record, or to conceal from an electronic image that is available for public viewing, that portion of the record containing exempt or confidential

protective investigation report until the court finds that there is probable cause to believe that the person identified committed an act of abuse, abandonment, neglect, or exploitation.³²

Federal Confidentiality Laws

The Family Educational Rights and Privacy Act (FERPA) and Individuals with Disabilities Education Act (IDEA) strictly limit the authority of schools to release student records to third parties.³³ School records may be released to a parent, defined by FERPA to include a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.³⁴ This definition may be interpreted to include foster parents or child welfare agencies with legal custody of a child.³⁵

Otherwise, information from a student's education record can only be released with a parent's consent or pursuant to court order.³⁶ The Family Educational Rights and Privacy Act does allow schools to disclose records, without consent, to:

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- Comply with a judicial order or lawfully issued subpoena;
- Appropriate officials in cases of health and safety emergencies;³⁷ and
- State and local authorities, within a juvenile justice system, pursuant to specific state law.³⁸

Consistent with FERPA, s. 1002.22(3)(d)14., F.S., provides that personally identifiable records or reports of a child may be released to the department or its community-based care providers without the consent of the child or the child's parent.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA)³⁹ prohibits disclosure of identifiable health information held or transmitted by covered entities. The federal act does

information.”

³² Sections 39.2021(3) and 415.1071(3), F.S.

³³ Steve Christian, *Educating Children in Foster Care*, NAT'L CONFERENCE OF STATE LEGISLATURES, 11 (December 2003), available at <http://www.ncsl.org/programs/cyf/cpieducate.pdf> (last visited April 4, 2008). See also s. 1002.22(3), F.S., which, consistent with federal law, makes student educational records confidential and exempt from ch. 119, F.S.

³⁴ 34 C.F.R. s. 99.3.

³⁵ Steve Christian, *supra* note 33, at 11.

³⁶ U.S. Dep't of Education, *Family Education and Privacy Rights Act (FERPA)*, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last visited April 4, 2008).

³⁷ 34 C.F.R. s. 99.36(b) provides that educational information in connection with an emergency to protect the health and safety of a student may be released to teachers in the school and at other schools.

³⁸ U.S. Dep't of Education, *supra* note 36.

³⁹ Pub. Law 104-191.

not restrict the use of “de-identified” health information, which is information that neither identifies nor provides a reasonable basis to identify an individual.⁴⁰

III. Effect of Proposed Changes:

This bill implements the priorities of the Governor and Secretary Butterworth regarding agency transparency and accountability.⁴¹ The Department of Children and Families (DCF or the department) presented a proposal to help implement these priorities, which was reviewed and approved by the Governor’s Commission on Open Government in 2007.⁴²

Child Case File Records

This bill creates s. 39.00145, F.S., requiring that a case file for a child under the supervision of or in the custody of the department be maintained in a complete and accurate manner. The case file must contain at least the following:

- The child’s case plan, and
- The full name and street address of all shelters, foster parents, group homes, treatment facilities, or locations where the child is placed.

The child must be provided a copy of his or her entire case file, at no cost, upon the request of the child or the child’s caregiver,⁴³ guardian ad litem, or attorney on behalf of the child. In addition, at the time that a prospective adoptive parent is identified for a child whose parents have had their rights terminated pursuant to ch. 39, F.S., the adoption entity must be provided with a copy of that child’s case file upon request.

If the child or the child’s caregiver, guardian ad litem, or attorney requests to review the case file, the case file must be made available for review at no cost. A request to review the file must be submitted in writing if made by the attorney.

Additionally, the bill authorizes the court to determine whether sharing information in the case file is necessary to ensure access to appropriate services or for the safety of the child. If such determination is made, the court may approve release of the records. The bill provides that the placement of a child in shelter care or a finding that a child is dependent pursuant to the chapter is a health and safety emergency for the purpose of disclosure of records under the Family Educational Rights and Privacy Act.

⁴⁰ U.S. Dep’t of Health & Human Servs., *Summary of the HIPPA Privacy Rule*, 4 (May 2003), available at <http://www.hhs.gov/ocr/privacysummary.pdf> (last visited April 4, 2008). See also 45 C.F.R. ss. 164.502(d)(2) and 164.514(a) and (b).

⁴¹ Dep’t of Children and Families, *Staff Analysis and Economic Impact, SB 2762*, 1 (March 14, 2008).

⁴² *Id.*; see also Dep’t of Children & Families, *Legislative Recommendations to the Commission* (Nov. 28, 2007), available at http://www.flgov.com/pdfs/og_abuselegislation.pdf (last visited April 5, 2008).

⁴³ The term “caregiver” is defined in s. 39.01(10), F.S., to mean “the parent, legal custodian, permanent guardian, adult household member, or other person responsible for the child’s welfare.” The term “other person responsible for the child’s welfare” includes the child’s legal guardian or foster parent; an employee of any school, public or private child day care center, residential home, institution, facility, or agency; a law enforcement officer employed in any facility, service, or program for children that is operated or contracted by the Department of Juvenile Justice; an adult sitter or relative entrusted with a child’s care; or any other person legally responsible for the child’s welfare in a residential setting.

The bill authorizes the sharing of confidential and exempt information between all state and local agencies and programs that provide services to children or are responsible for children's safety, if the information is reasonably necessary to assure access to services or the safety of the child, including the:

- Department of Juvenile Justice;
- Department of Health;
- Agency for Health Care Administration;
- Agency for Persons with Disabilities;
- Department of Education;
- Individual school districts; and
- Statewide Guardian ad Litem Office.

The sharing of confidential and exempt information described in this portion of the bill is not limited to the agencies and programs listed, so it may be interpreted to include a myriad and unlimited number of agencies and programs that provide services to children.

Reports and Records in Cases of Child Abuse, Neglect, or Abandonment

The bill amends s. 39.202, F.S., to authorize access to confidential and exempt child abuse records by community-based care lead agencies and their subcontracted providers. The bill also authorizes access to confidential and exempt child abuse records by persons with whom the department is seeking to place the child or with whom placement has been granted, including:

- Foster parents for whom an approved home study has been conducted;
- The designee of a licensed residential group home under s. 39.523, F.S.;
- An approved relative or nonrelative placement pursuant to s. 39.402(4), F.S.;
- Preadoptive parents for whom a favorable preliminary adoptive home study has been conducted;
- Adoptive parents; or
- An adoptive entity on behalf of preadoptive or adoptive parents.

The bill requires any entity granted access to confidential and exempt child abuse records to provide access to any other entity or individual entitled to access, and authorizes any individual or entity entitled to access child abuse records to petition a circuit court to enforce the provisions of the statute.

The bill amends s. 39.2021, F.S., authorizing the Secretary of the department to release confidential and exempt records pertaining to investigations of abuse, abandonment, or neglect of a child which resulted in serious mental, emotional, or physical injury to a child (except for the name of the reporter), if the Secretary determines that release is in the public interest. In making this determination, the Secretary must balance the best interests of the child who is the focus of the investigation, as well as the privacy rights of other persons identified in the reports, including the child's siblings, against the public interest. The bill provides that the public interest includes the need for the public to know about and be able to evaluate the actions of the

department and the court system. The Secretary must state in writing and with specificity the basis for the determination of public interest, and if the Secretary determines that release of the records is in the public interest, the department must redact any identifying information with respect to any person identified in the report of abuse, abandonment, or neglect, until the court finds probable cause to believe that the person identified committed an act of alleged abuse, abandonment, or neglect. (See **Constitutional Issues** section below.)

Prior to releasing the confidential and exempt records, the department must make a good faith effort to notify the child, the child's caregiver, the child's attorney, the guardian ad litem assigned to the case, any person named as an alleged perpetrator, and any law enforcement agency actively involved in the investigation. Notification must be made via hand or overnight delivery service with evidence of delivery, and must take place at least three business days before release of the records.

After receiving notice, any of the notified persons may petition a circuit court for an order preventing the department from releasing the records. If the department is provided actual or constructive notice of intent to file a petition by any of the notified persons, it may not release the records until the court has denied the petition or, if no petition is filed, until 10 days after notification of intent to file. The court may order the department not to release the records only if it finds that the best interest of the child who is the focus of the investigation and the interest of the child's siblings, together with the privacy rights of other persons identified in the reports, are outweighed by the public interest. If the petition is filed by a law enforcement agency actively involved in an investigation, the court shall also weigh the interest of the law enforcement agency in maintaining the confidentiality of those records while the investigation is active.

Reports and Records in Cases of Abuse, Neglect, or Exploitation of a Vulnerable Adult

The bill amends s. 402.115, F.S., to include the Department of Juvenile Justice among the entities that may share confidential information concerning individuals who are served by the agencies.

The bill amends s. 415.107, F.S., to authorize any individual or entity that is entitled to access records under ch. 415, F.S., relating to adult protective services, to petition a circuit court to enforce the statute's provisions.

Section 415.1071, F.S., is amended to authorize the Secretary of the department to release confidential and exempt records pertaining to investigations of abuse, neglect, or exploitation of a vulnerable adult that resulted in serious mental, emotional, or physical injury to a vulnerable adult (except for the name of the reporter), if the Secretary determines that release is in the public interest. In making this determination, the Secretary must balance the best interests of the vulnerable adult who is the focus of the investigation, as well as the privacy rights of other persons identified in the reports, against the public interest. The bill provides that the public interest includes the need for the public to know about and be able to evaluate the actions of the department and the court system. The Secretary must state in writing and with specificity the basis for the determination of public interest, and if the Secretary determines that release of the records is in the public interest, the department must redact any identifying information with respect to any person identified in the report of abuse, neglect, or exploitation until the court

finds probable cause to believe that the person identified committed an act of alleged abuse, neglect, or exploitation. (See **Constitutional Issues** section below.)

Prior to releasing the confidential and exempt records, the department must make a good faith effort to notify the vulnerable adult, the vulnerable adult's guardian (if any), the vulnerable adult's attorney, any person named as an alleged perpetrator, and any law enforcement agency actively involved in the investigation. Notification must be made via hand or overnight delivery service with evidence of delivery, and must take place at least three business days before release of the records.

After receiving notice, any of the notified persons may petition a circuit court for an order preventing the department from releasing the records. The department may not release the records if it has been notified that any of the specified persons have an intent to file a petition unless such petition is filed within 10 business days after such notification. Further, the court may order the department not to release the records only if it finds that the best interest of the petitioner outweighs the public interest.

The bill provides an effective date of July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill authorizes the Secretary of the Department of Children and Families to release confidential and exempt records upon his or her determination that release is in the public interest. Although the bill provides certain criteria for the Secretary to follow in making the determination of public interest, it may be an unconstitutional delegation of legislative authority.⁴⁴ According to Florida Jurisprudence:

The crucial test in determining whether or not a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine if the agency is carrying out the legislature's intent.

⁴⁴ See *Florida State Bd. of Architecture v. Wasserman*, 377 So. 2d 653, 655 (Fla. 1979) (“[t]he legislature is prohibited by the constitution from conferring upon administrative agencies authority which the constitution assigns exclusively to the legislature itself”).

The specificity of standards and guidelines required from the legislature depends on the subject matter dealt with and the degree of difficulty involved in articulating finite standards. Objective guidelines and standards should appear expressly in the legislation or be within the realm of reasonable inference from the language of the legislation where a delegation of power is involved, especially where the legislation contemplates a delegation of power to intrude into the privacy of citizens.

Without sufficiently precise standards in statutes, the legislature impermissibly delegates basic policy decisions to the personal predilections of others. The law must be so complete in all its terms and provisions when it leaves the legislative branch of government that nothing is left to the judgment of the delegate or appointee of the legislature, and if a named authority is authorized to decide what should and should not be deemed an infringement of the law, it must be held unconstitutional as an attempt to make an improper delegation of legislative power.⁴⁵

The Florida Supreme Court has stated that “[u]nbridled discretion is prohibited by this state’s adherence to the doctrine of nondelegation of legislative power, pursuant to article II, section 3, Florida Constitution. Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.”⁴⁶

In *State v. Mitchell*, the court found that the portion of s. 790.001(4), F.S., which provided that a “destructive device” is “any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms,” was invalid as an unconstitutional delegation of legislative authority because the statutory language did not provide definite limitations or rules for the Bureau to apply in determining whether an item is a destructive device.⁴⁷

Authorizing the Secretary of DCF to determine whether to release confidential or exempt records based on the public interest involved may be an unlawful delegation of authority if a court determines that the statute does not provide sufficient standards or guidelines for the Secretary to consider in making such determination.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

⁴⁵ 10A FLA. JUR. 2D *Constitutional Law* s. 206.

⁴⁶ *Microtel, Inc. v. Florida Public Service Com’n*, 464 So. 2d 1189, 1191 (Fla. 1985).

⁴⁷ *State v. Mitchell*, 652 So. 2d 473, 478 (Fla. 2d DCA 1995).

B. Private Sector Impact:

The bill may have an indeterminate fiscal impact on private contractors (community-based care providers), to the extent those providers will be required to supply copies of case files to persons identified by the bill upon request and at no cost.

Individuals who object to disclosure of confidential and exempt information have no remedy except through the court system, which may impose a financial barrier on some individuals.

C. Government Sector Impact:

The bill may have an indeterminate fiscal impact on the department, to the extent the department will be required to supply copies of case files to persons identified by the bill upon request and at no cost.

The bill requires the department to provide notification to affected parties via hand or overnight delivery three business days prior to releasing information relating to an abuse case involving serious mental, emotional, or physical injury to a child or vulnerable adult. According to the department, this may have a fiscal impact, but the department expects to fund it within existing resources.⁴⁸

The bill permits any individual or entity that is entitled to access to records under ch. 415, F.S., relating to adult protective services, to petition the circuit court to enforce the provisions of s. 415.107, F.S. This may result in an increase in court workload, but the exact impact is unknown.

VI. Technical Deficiencies:

There is a technical deficiency in the bill, on line 288. The sentence provides that

. . . the circuit court may order the department not to release the records only after finding that the best interests of the child who is the focus of the investigation and the interest of the child's siblings, together with the privacy rights of other persons identified in the reports, are outweighed by the public interest.

It appears that the above-referenced provision is missing the word “not” in the last clause of the sentence. Without the addition of the word “not” in the last clause before the word “outweighed”, the court may order the department not to release a child’s records if the public interest outweighs the child’s. The court should prohibit release of a child’s records if the child’s interest outweighs the public interest. Instead, the sentence should read:

. . . the circuit court may order the department not to release the records only after finding that the best interests of the child who is the focus of the investigation and the interest of

⁴⁸ E-mail from Molly Jones, Deputy Director, Legislative Affairs, Dep’t of Children and Families (March 29, 2008) (on file with the Senate Committee on Children, Families, and Elder Affairs).

the child's siblings, together with the privacy rights of other persons identified in the reports, are not outweighed by the public interest.

The bill uses the term “adoptive entity” on when referring to whom confidential and exempt child abuse records may be released. Chapter 63, F.S., dealing with adoption, defines the term “adoption entity,” but not “adoptive entity.” It appears that the intent of the bill is that adoption entities may receive confidential and exempt child abuse records on behalf of preadoptive or adoptive parents. If this is the case, it may be appropriate to change the term to read “adoption entity.”

The bill provides that if records are released, the department must redact the name of “**any person** identified in the report ... until the court finds that there is probable cause to believe **the person** identified committed an act” of alleged abuse, neglect, abandonment, or exploitation. It is unclear whether the intent of the bill is to have the department redact every person’s name who is identified in the report, until the court determines whether there is probable cause that the alleged perpetrator committed the act; or whether the intent of the bill is to require the department to redact only the alleged perpetrator’s name until a court finds probable cause that the alleged perpetrator committed the act.

VII. Related Issues:

In section 1, the bill requires that a child’s case file be made available for review by the child, or by the child’s caregiver, guardian ad litem, or attorney, upon request (written if made by guardian ad litem or attorney) and at no cost. It is unclear how a review of a file would create a cost. It is also unclear why a request to *review* the file must be made in writing by an attorney, who is subject to rules of the Florida Bar, and no other person requesting access. Further, it is unclear why a request to review the records must be made by the attorney in writing, although no writing is required for a complete *copy* of that record.

The bill requires any entity that is granted access to records to grant access to any other entity or individual entitled to access. It is unclear how an entity or individual authorized to receive confidential and exempt records would know whether any other entity or individual also is granted such access. It is the responsibility of the department to make such determinations.

The bill provides that the Department of Children and Families (DCF or the department) must release a child’s case file to the child upon request, without exception. As such, the department has no discretion if, for example, the child is very young or may be psychologically damaged by information contained in the records. These records could contain explicit information about the parentage of that child, for example that the child’s grandfather is also the child’s father, as well as information about sexual or physical abuse of that child. The bill, however, requires the department to release the information in a manner and setting that is appropriate to the age and maturity of the child and the nature of the information being released which may include the release of such information in a therapeutic setting, if appropriate.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS/CS/CS by Governmental Operations on April 22, 2008:**

- Re-organizes the bill for clarity.
- Provides that the department shall release a child's record in a manner and setting that is appropriate to the age and maturity of the child and the nature of the information being released, which may include the release in a therapeutic setting, if appropriate.
- Permits access to a child's records by persons with whom the department is seeking to place child or with whom placement has been granted.
- Provides that when the secretary makes a determination to release a child's records is in the public interest, the child, the child's caregiver, the child's attorney, the guardian ad litem, any alleged perpetrator, and any law enforcement agency actively investigating may petition a circuit court for an order preventing the department from releasing the records. If the department is notified that there is an intent to file a petition and such petition is not filed within 10 business days after such notification, the department may release the records thereafter. Provides that the circuit court may order the department not to release the records only after finding that the best interests of the child who is the focus of the investigation and the interest of the child's siblings, together with the privacy rights of other persons identified in the reports, are outweighed by the public interest. If the petition is filed by a law enforcement agency actively involved in an investigation, the court shall also weigh the interest of the law enforcement agency in maintaining the confidentiality of those records while the investigation is active.
- Provides that when the secretary makes a determination to release a vulnerable adult's records is in the public interest, the vulnerable adult, the vulnerable adult's caregiver, attorney, any alleged perpetrator, and any law enforcement agency actively investigating may petition a circuit court for an order preventing the department from releasing the records. If the department is notified that there is an intent to file a petition and such petition is not filed within 10 business days after such notification, the department may release the records thereafter. The circuit court may order the department not to release the records only after finding that the best interests of the petitioner outweigh the public interest.

CS/CS by Judiciary on April 8, 2008:

The committee substitute:

- Clarifies that access to confidential and exempt child abuse records shall be granted to persons with whom placement of a child is being *actively* considered or has been granted, including foster parents with an approved home study, designees of a licensed residential group home, an approved relative or nonrelative placement, preadoptive parents with a favorable preliminary home study, adoptive parents, or an adoptive entity on behalf of preadoptive or adoptive parents;

- Provides guidelines for the Secretary of the department to follow in making a determination of public interest;
- Requires the Secretary to state in writing and with specificity the basis for the determination of public interest;
- Instructs the department to redact any identifying information with respect to any person identified in the report of abuse, abandonment, neglect, or exploitation before releasing confidential and exempt records;
- Clarifies that the department must make a good faith effort (rather than attempt) to notify specified individuals of the upcoming release of confidential and exempt records; and
- Deletes the requirement that, if notified that a petition to prevent the department from releasing the records has been filed, the department cannot release the records without a court order.

CS by Children, Families, and Elder Affairs on April 1, 2008:

The committee substitute:

- Provides that an adoption entity shall be provided with a child's case file in specified circumstances.
- Clarifies that a court may approve the release of confidential records to any entity (rather than to certain specified entities) to ensure safety or access to services.
- Clarifies that records shall not be shared if they are otherwise confidential under federal law.
- Deletes a provision that defined the Department of Children and Families (DCF or the department) as a parent for the purpose of receiving and sharing education records.
- Clarifies that the provisions related to sharing of information among agencies does not apply to clients or records of domestic violence centers.
- Clarifies who is a person with whom placement of a child is being considered for purposes of having access to records.
- Reinstates the option for the department to petition a court for an order for immediate release of records pertaining to investigations of abuse or neglect of a child or adult.
- Provides that the Secretary must balance the privacy interest of the affected adult or child against the public interest in disclosure of confidential information.
- Replaces "make a good faith effort" with "attempt" to describe DCF's responsibilities with respect to notification before release of confidential information.
- Replaces 72 hours with three business days.
- Provides that DCF may not release records if it is notified that a petition to prevent release has been filed.
- Deletes provisions relating to disclosure to adoptive parents.
- Makes technical changes.

B. Amendments:

None.